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In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS IN REPLY TO THE SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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We submit this brief to reply to the arguments respondents have raised in their supplemental brief addressing the effect on this case of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*.

1. Respondents agree (Resp. Supp. Br. 3-4) that the 1984 Act controls this case and that the claims of the named and unnamed class members must be remanded to the Secretary for further administrative proceedings pursuant to the 1984 Act. But respondents nevertheless contend that this Court should provide for the district court on remand to retain jurisdiction over the case for the indefinite future in order to exercise continuing control over the Secretary's implementation of the 1984 Act and to resolve what they suggest may be an endless stream of issues that any of the thousands of

class members might seek to interject into this suit. Nothing could be more inconsistent with the clear congressional intent to end the massive litigation that has disrupted the disability program and to provide instead for the return of the cases of the class members to the Secretary so that she may interpret and apply the 1984 Act to these and all other claimants in a fair and uniform manner.

In contrast to the confusion respondents' approach would sow, the disposition we have suggested follows from a straightforward application of the mandatory terms of the 1984 Act. Respondents make no effort to answer our construction of the pertinent provisions of the text and legislative history of the 1984 Act. Indeed, respondents do not even discuss those materials, much less cite anything in them to support their proposal for open-ended litigation in the lower courts in this and numerous other cases. Nor do respondents indicate that they would have anything relevant to add in yet another round of briefing in this Court, which they offer as an alternative course (Resp. Supp. Br. 12-13). In these circumstances, we believe that the Court should enter an order requiring dismissal of the complaint after the cases of class members have been remanded to the Secretary. Such an order would provide guidance to the lower courts in the disposition of these medical improvement class actions and enable the Secretary to implement the 1984 Act with the uniformity and dispatch Congress intended.

2. Respondents maintain (Resp. Supp. Br. 6, 11, 12) that the district court should be permitted on remand to clarify the scope of the class and that our proposed order directing the district court to dismiss the complaint might foreclose that possibility. We agree with respondents that if there is uncertainty regarding the scope of the class — *e.g.*, the date after which the administrative decision on an individual's claim must have been rendered in order for the individual to

be included in the class — that question should be clarified by the district court on remand. But the order we have proposed for the Court to enter would not foreclose the district court from doing so; that order would direct the district court to dismiss the complaint only *after* it has remanded the cases of the named and unnamed class members to the Secretary for administrative proceedings pursuant to Sections 2(d)(2)(C) and 2(d)(3) of the 1984 Act. A clarification by the district court of the general scope of the class logically would be accomplished *before* that remand, so that the court could indicate what category of individuals is covered by the remand. To remove any possible ambiguity on this point, however, we suggest at the conclusion of this brief a modified version of the order we previously proposed. See page 8, *infra*.

3. Respondents further argue (Resp. Supp. Br. 6-7, 12) that the district court should not dismiss the complaint even after the cases of all named and unnamed class members have been remanded to the Secretary as required by the 1984 Act. Respondents contend that the district court should instead retain jurisdiction to identify unnamed class members and locate them, to direct the Secretary's sending of notices to them, and to determine what steps should be taken if the certified letter sent to a class member cannot be delivered. That is precisely the sort of continuing judicial intrusion into the Secretary's administration of the Social Security disability program that Congress intended to halt by substituting a special statutory remand and notification procedure to be implemented on a uniform basis by the Secretary for whatever varying procedures the district courts might otherwise have fashioned under Fed. R. Civ. P. 23.[1]

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[1]The clear intent of Congress to supplant the operation of Rule 23 in this setting is reflected as well in the prohibition in Section 2(d)(5) of the 1984 Act against the certification of any class in a class action relating to medical improvement after the September 19, 1984 cut-off date.

Although Congress defined the category of individuals entitled to request a reopening of their cases under the special statutory procedure in terms of whether they were unnamed class members in a certified class action, the identification and notification of these individuals and the reopening of their cases upon request is to take place outside of the context of the class action and the jurisdiction of the district court. Congress has assigned those responsibilities directly to the Secretary, and they are to be carried out only *after* the district court has remanded the cases to the Secretary, thereby effectively dissolving the class action in court. Judicial review then will be available only after the Secretary has issued a superseding decision on the individual's claim following the remand and the individual has fully exhausted his administrative remedies. § 2(d)(3) and (4).

For this reason, respondents plainly err in contending (Resp. Supp. Br. 6) that the district court in this and other class actions has the authority to monitor the Secretary's disposition of the claims of thousands of individuals affected by Section 2(d)(3) of the Act (cf. *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 21-23) and that on-going proceedings will be required in district court for that purpose. To the contrary, the legislative history makes clear that this is purely an administrative task under the direction of the Secretary.[2]

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[2]See 130 Cong. Rec. H9828 ((daily ed.) Sept. 19, 1984) (Joint Explanatory Statement of the Committee of Conference) (emphasis added):

> The conferees recognize that there will be considerable *administrative* difficulty in identifying and notifying individuals who are eligible to have their cases redetermined as a result of their being unnamed members of class actions certified prior to September 19, 1984. Notwithstanding the *administrative* difficulty of this task, the conferees expect the *Secretary of Health and Human*

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4. Respondents also contend (Resp. Supp. Br. 7) that the district court should retain jurisdiction to resolve issues that might arise regarding other substantive provisions of the 1984 Act, such as whether class members who claim disability benefits on the basis of mental impairment are covered by the "moratorium" on review of mental impairment cases in Section 5 of the 1984 Act. Contrary to respondents' apparent view, however, the class action that was pending on September 19, 1984 with regard to particular issues arising under prior law is not an open forum for the airing and resolution of whatever issues might be raised by or on behalf of any of the thousands of individuals who happen to be members of the class. To the contrary, the proper interpretation and application of the new mental impairment provision in Section 5 (and of any other features of the 1984 Act or the Social Security Act generally) are to be determined by the Secretary in the first instance through rulemaking, instructions, and administrative adjudication. The mental impairment issue respondents seek to intrude into this case therefore can be raised by any class member in the course of further administrative proceedings after his case is remanded to the Secretary, if the individual requests that the prior decision denying his claim be reopened.[3] The

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Services to act expeditiously in notifying these individuals of the provisions of this act which are applicable to them.

There is no mention of a role for the various district courts in this process, which would undermine the overriding goals of expedition and uniformity. To the extent respondents are concerned that certain notices might be returned undelivered (Resp. Supp. Br. 12), we have been informed by the Department of Health and Human Services that it has established procedures for the administration of the Social Security program generally to address that problem.

[3]Because the court of appeals held that exhaustion of administrative remedies was not a prerequisite to an individual's being included in the class in this case, many members of the respondent class may still have live claims for continuing disability benefits pending before the Secretary in conformity with applicable procedural regulations. The cases of

district court in this and other cases cannot pretermit that process and circumvent the requirement of exhaustion of administrative remedies by purporting to resolve the mental impairment issue or any other issues in the context of the instant litigation, either prior to remanding the cases of named and unnamed class members to the Secretary pursuant to the 1984 Act or while those cases are pending before the Secretary after the remand.

5. Equally without merit is respondents' suggestion (Resp. Supp. Br. 12) that class members whose benefits were terminated for reasons unrelated to the "medical improvement" issue might be permitted to continue to litigate in district court the other issues that are presented in the complaint in this case — *e.g.*, the proper standards for evaluation of pain, multiple impairments, or evidence from the treating physician — instead of having their individual cases remanded to the Secretary. As we have explained (Pet. Supp. Br. 9 n.9), the 1984 Act requires that the cases of all individual class members be remanded to the Secretary because the overall class action is one relating to medical improvement. Moreover, under *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), and related decisions, this class action could not proceed on these other issues because the class members have not exhausted their administrative remedies as required by 42 U.S.C. 405(g) and implementing regulations. In the 1984 Act, Congress fashioned a narrow exception to the exhaustion requirement applicable only to

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those individuals will automatically be reviewed under the medical improvement standard and other provisions of the 1984 Act by virtue of Section 2(d)(2)(B) of that Act, without the need for them to be notified and to request reopening under Section 2(d)(3) as an unnamed member of the class action in court. The practical importance of Section 2(d)(3) is for unnamed class members who, unlike those just discussed, effectively abandoned their claims by not personally seeking further administrative review or judicial review within the 60 days allowed.

certified class actions involving the medical improvement issue. And even then Congress provided only for a special procedure for remand and administrative review of the individual's claim for benefits; it did not permit further litigation in court in contravention of the exhaustion requirement. Finally, the text and legislative history of the 1984 Act establish that in disability cases involving issues other than medical improvement, the exhaustion and 60-day time limit requirements of 42 U.S.C. 405(g) and the Secretary's regulations are fully applicable. See Pet. Supp. Br. 7-8 & nn. 7, 8.

In the course of exhausting administrative proceedings after the statutory remand, any individual respondent will be entitled to raise the other issues that were presented in the complaint in this class action, if those issues continue to have a bearing on his claim for benefits. The individual then would be entitled to judicial review after the Secretary has had an opportunity to interpret and apply the provisions of the 1984 Act and the Social Security Act and has entered a "new" and "superseding" final decision on the individual's claim for benefits. § 2(d)(4). Accordingly, contrary to respondents' contention (Resp. Supp. Br. 12), they will not "be denied the opportunity to proceed in federal court" with regard to the other issues they presented in the complaint if the complaint is dismissed. Each individual respondent will have unimpeded resort to federal court (including, if appropriate, in a class action) in the manner Congress intended under 42 U.S.C. 405(g), after full exhaustion of administrative remedies.[4]

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[4]Respondents' suggestion (Resp. Supp. Br. 12) that Congress might be barred from applying a new statutory provision on these other issues to pending cases if the provision is less favorable than the standard under the prior law of the circuit is frivolous. An individual citizen acquires no vested right under a statutory benefits program to have the rule in a particular circuit applied to his case, since that circuit's rule is

CONCLUSION

For the foregoing reasons and the additional reasons stated in our Supplemental Brief, we suggest that the Court enter the following order in this case:

> The petition for a writ of certiorari is granted, the judgment of the court of appeals is vacated, and the case is remanded to the court of appeals to be remanded to the district court with instructions to: (i) remand the cases of the named respondents to the Secretary for review pursuant to Section 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984; (ii) make any necessary clarifications in the definition and scope of the class; (iii) remand the cases of the unnamed class members to the Secretary for proceedings pursuant to Section 2(d)(3) of that Act; and (iv) dismiss the complaint.

Respectfully submitted.

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always subject to review in this Court. *Richardson* v. *Belcher*, 404 U.S. 78, 80-81 (1971). Moreover, even where, unlike here, prior law might have appeared settled on a given question, it is firmly established that Congress may provide for a change in the law to be applied to pending cases, especially in an area of "great national concerns," such as the Social Security program. See, *e.g.*, *Bradley* v. *Richmond School Board*, 416 U.S. 696, 712 (1974), quoting *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801). In any event, respondents' argument is plainly premature. Any member of the respondent class who ultimately proves to be disadvantaged by application of the new standards in the 1984 Act may raise this argument on judicial review following the statutory remand of his case to the Secretary and subsequent exhaustion of administrative remedies.